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IN THE

Supreme Court of the United States

October Term, 1946.

No. 940 78

CHICAGO AND SOUTHERN AIR LINES, INC.,
Petitioner,

versus

WATERMAN STEAMSHIP CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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Of Counsel:
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J. S. VERNER.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1946.

No. .....

CHICAGO AND SOUTHERN AIR LINES, INC.,
Petitioner,

versus

WATERMAN STEAMSHIP CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, Chief Justice and Associate Justices of the Supreme Court of the United States:

Now comes Chicago and Southern Air Lines, Inc., a Delaware corporation, and respectfully prays that a writ of certiorari be issued to review the decree of the United States Circuit Court of Appeals for the Fifth Circuit, entered February 14, 1947, denying petitioner's motion to dismiss the petition for review filed by Waterman Steamship corporation, respondent.[1]

[1] Also referred to herein as Waterman.

OPINION BELOW.

The opinion of the court below is reported in 159 F(2) 828.

JURISDICTION.

Jurisdiction is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, sec. 1, (28 U. S. C. 347(a), 43 Stat. 938). The decree of the lower court was rendered February 14, 1947. There was no application for a rehearing.

QUESTIONS PRESENTED.

The first question presented by this petition is whether a United States Circuit Court of Appeals has jurisdiction to review a decision of the Civil Aeronautics Board, approved by the President of the United States, under Section 801 of the Civil Aeronautics Act of 1938, as amended,[2] granting a certificate of public convenience and necessity for overseas and foreign air transportation.

A still further question is whether a petition to review a decision of the Civil Aeronautics Board,[3] filed under Section 1006 of the Act,[4] must be filed within sixty days after the entry of the decision, when no stay thereof is obtained.

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[2] 49 USC 601; June 23, 1938, c. 601, sec. 801, 52 Stat. 1014; Reorg. Plan No. III, sec. 7, eff. June 30, 1940, 5 Fed. Reg. 2109, 54 Stat. 1233. The Civil Aeronautics Act, as amended, is referred to herein simply as the Act.

[3] Referred to herein simply as the Board.

[4] 49 USC 646, 54 Stat. 1235. See note 12, infra.

SUMMARY STATEMENT.

In 1940 Waterman Air Line, Inc., a subsidiary of respondent, filed an application with the Board, under Section 401 of the Act,[5] for a certificate of public convenience and necessity to engage in air transportation between the United States and Puerto Rico. Thereafter, respondent itself was substituted as the applicant.

Meanwhile, petitioner herein filed with the Board an application seeking a certificate of public convenience and necessity to engage in air transportation between New Orleans and San Juan, (a) via Cuba, Haiti, and the Dominican Republic, and (b) via Tampa, Miami, Cuba, Haiti and the Dominican Republic. Petitioner herein also filed applications for other routes in the Caribbean and Central American areas. The applications filed on behalf of petitioner and of respondent were consolidated with many others in a proceeding referred to as "Additional Service to Latin America".[6]

Hearings on the applications were held before examiners of the Board. Briefs were filed with the examiners, and they submitted their report on March 5, 1945, serving copies on all parties. Exceptions and briefs were filed by all parties, who were then allowed to present arguments before the Board from April 30 to May 5, 1945.

Finally, on May 17, 1946, the Board rendered an opinion in said proceeding.[7] Included in that opinion was the decision that petitioner should be issued a certificate of public convenience and necessity for foreign and overseas air transportation of persons, property and mail "between

[5] 49 USC 481, 52 Stat. 987.
[6] Docket 525 of the Civil Aeronautics Board.
[7] R. p. 118, et seq.

the co-terminal points, New Orleans, La. and Houston, Tex., the intermediate point Havana, Cuba, and (a) beyond Havana, Cuba, the intermediate points Camaguey, Cuba, Port-au-Prince, Haiti, Ciudad Trujillo, Dominican Republic, and the terminal point San Juan, Puerto Rico, and (b) beyond Havana, Cuba, the intermediate points Kingston, Jamaica, Aruba, Netherlands West Indies, Curacao, Netherlands West Indies, and the terminal point Caracas, Venezuela." At the same time, the Board denied the applications of respondent and others for all or portions of the foregoing routes; also, the Board denied respondent's previous motion of May 6, 1946, which had requested the Board to re-open the proceedings to receive further evidence and for re-argument, on the proposed New Orleans-San Juan route.

The Board's decision was referred to the President of the United States in accordance with the provisions of Section 801 of the Act,[8] and on May 22, 1946, the President approved the decision of the Board to certificate petitioner and to deny the other applications. On May 24, 1946, a copy of the Board's decision as approved by the President was served upon Waterman and on the same day the certificate was issued to petitioner.

On June 24, 1946, Waterman filed a request for rehearing. The rules of the Board, which were promulgated under the authority of Section 1005 of the Act,[9] provide that:[10]

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[8] 49 USC 601, 52 Stat. 1014.

[9] 49 USC 645; June 23, 1938, c. 601, sec. 1005, 52 Stat. 1023, Reorg. Plan No. IV, sec. 7, eff. June 30, 1940, 5 Fed. Reg. 2421, 54 Stat. 1235.

[10] Sec. 285.11 of the Rules of Practice of the Civil Aeronautics Board under Title IV and Section 1002 (d) to (I) of the Civil Aeronautics Act of 1938 as amended.

> "No petition for rehearing, reargument or reconsideration filed in accordance with this Section, on the granting thereof, shall operate as a stay of the effective date of the final order sought to be modified or vacated by such petition, unless specially so ordered by the Board."

No stay of the Board's opinion of May 17, 1946 was requested by Waterman and none was ordered by the Board. Moreover, on July 12, 1946, less than sixty days after the rendition and the service of the opinion of the Board, the Board denied the application for a rehearing.

Thereafter, on September 6, 1946, considerably more than sixty days after the rendition and service of the Board's opinion, Waterman filed a petition in the court below, asking for a review of the foregoing action by the Board.

After the expiration of sixty days, a petition may be filed in the Circuit Court of Appeals only upon leave of that court after a showing of reasonable grounds for failure to file the petition theretofore.[11] No such showing was made by Waterman and the court was not called upon and did not make such a finding in that regard.

The Board filed a motion to dismiss the petition to review for lack of jurisdiction. After being granted leave by the court below to intervene, petitioner herein also moved to dismiss Waterman's petition to review.

Petitioner's motion to dismiss was predicated, in part, on the ground that the Circuit Court of Appeals lacked

[11] Sec. 1006 of the Act. For complete citation see infra, note 12.

jurisdiction to review the award, approved by the President, of a certificate of public convenience and necessity for overseas and foreign transportation. In support of its position, petitioner showed, among other things:

1. The decision of the Board was not within the jurisdiction to review conferred upon the court below by Section 1006(a) of the Act,[12] since that section does not and cannot operate to confer upon that court jurisdiction to review the issuance or denial of certificates, the issuance or denial of which is subject to the approval of the President of the United States under Section 801 of the Act.[13]

2. The decision of the Board was simply an advisory one subject to the approval or disapproval of the President of the United States and was ineffective without the President's approval.

3. The decision of the Board was in effect an order of the President of the United States. No jurisdiction to review such an order of the President has been conferred on the court below.

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[12] 49 USC 646, June 23, 1938, c. 601, sec. 1006, 52 Stat. 1024, Reorg. Plan No. IV, sec. 7, eff. June 30, 1940, 5 Fed. Reg. 2421, 54 Stat. 1235. The pertinent provisions of this section are: "Any order, affirmative or negative, issued by the Board under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this chapter, shall be subject to review by the circuit court of appeals of the United States . . . upon petition filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore."

[13] 49 USC sec. 601. The pertinent provisions of this section are: "The issuance, denial . . . and the terms . . ., contained in any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 482, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Civil Aeronautics Board before hearing thereon, and all decisions thereon by the Civil Aeronautics Board shall be submitted to the President before publication thereof."

4. The court below by reason of the powers conferred upon the President by Section 801 of the Act,[14] subjecting to his ultimate approval the issuance or denial of the certificate in question, is without power to render a judgment with finality and conclusiveness, and hence the petition for review presented no case or controversy to which the judicial power extends.

5. The issuance of the certificate of public convenience and necessity to petitioner rested solely within the discretion of the President of the United States under Section 801 of the Act, and since the action of the President was not required to be predicated on evidence produced at the hearing before the Board, respondent Waterman did not present, cannot present, and cannot have presented, a record susceptible of review, and, accordingly, there is and can be no record before the court below for review.

Petitioner's motion to dismiss was also predicated on the following ground:

Waterman's petition for review filed on September 6, 1946, was not within the 60-day period allowed under Section 1006 of the Act.[15]

After hearing, the court below rendered its decision denying the motions to dismiss. In answering in the affirmative the first question above stated the court in the course of its opinion said:

"We are aware that this question was decided otherwise in Pan-American Airways Company vs. Civil Aeronautics Board, 121 Fed. (2d) 810."

[14] Note 13, supra.
[15] Note 12, supra.

REASONS FOR GRANTING THE PETITION.

1. The decision of the Circuit Court of Appeals for the Fifth Circuit is directly in conflict with the decision on the same question rendered by the Circuit Court of Appeals for the Second Circuit in *Pan-American Airways vs. Civil Aeronautics Board*, 121 F. (2d) 810,[16] and this conflict should be resolved by this Court.

2. The decision of the court below involves important questions of federal law, which have not been, but should be, settled by this Court.

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[16] In the Pan-American case the court said:

"It seems clear that in approving or disapproving of certificates of public convenience and necessity the President must frequently act on information which was not before the Board and may even have become available to him after the Board has taken its testimony and granted the certificates. There is nothing in the Act to show that in granting certificates of public convenience and necessity the Board is acting as anything more than the President's adviser. His necessary approval or disapproval makes him, not the Board, the ultimate arbiter. United States vs. George S. Bush & Company, 310 U. S. 371, 60 S. Ct. 944, 84 L. ed. 1259.

"If the President has approved of a certificate authorizing a carrier to engage in foreign air transportation and we should attempt to review the order authorizing the issuance of the certificate, we would be placed in a position where we might be obliged to reverse a tribunal whose subsequent action the President would decline to approve. His sweeping powers are illustrated by the fact that under Section 801 he is obliged not only to approve or disapprove of a certificate for foreign air transportation, but even to approve or disapprove of the denial of such a certificate by the Board. It seems incredible that in enacting Section 1006(a) Congress intended to permit a review of the action of the Board in cases where the constitutional authority of the President to negotiate with foreign nations and to proceed upon confidential and other information at his disposal and his statutory duty under Section 801 to approve or disapprove of certificates, and even of the denial of them, would necessarily render our review futile. United States v. Belmont, 301 U. S. 324, 57 S. Ct. 758, 81 L. ed. 1134; United States v. Curtis Wright Corp., 299 U. S. 304, 57 S. Ct. 216, 81 L. ed. 255. The review of the order authorizing the issuance of the certificates is so dependent upon considerations resting in the Executive discretion that it cannot be regarded as authorized by Section 1006(a). . . ."

3. The court below has decided federal questions in a way probably in conflict with the applicable decisions of this Court.

4. The petition should be granted at this juncture in this proceeding because:

(a) The decision of the court below is final insofar as the question of jurisdiction is concerned. *George A. Fuller Co. vs. Otis Elevator*, 245 U. S. 489; *Ex Parte Querin*, 317 U. S. 1.

(b) This Court has reviewed by writ of certiorari a similar question of jurisdiction in a similar proceeding before a decision on the merits. *Federal Power Commission vs. Pacific Power & Light Co.*, 307 U. S. 156.

(c) The judgment below involves an issue "fundamental to the further conduct of the case". *United States vs. General Motors Corporation*, 323 U. S. 373, 377; *Land vs. Dollar*, No. 207, October Term, 1946, decided April 7, 1947.

(d) The granting of this petition would expedite a determination of the litigation.

(e) Inasmuch as petitioner has begun operations under the certificate of public convenience and necessity presently in dispute and desires to extend its operations thereunder, a speedy determination of petitioner's right is necessary and equitable to prevent great financial loss and damage.

(f) No purpose would be served in permitting the court below to conduct extensive hearings involving the printing and study of a voluminous record if that court has no jurisdiction to entertain the proceeding.

Wherefore, petitioner respectfully prays that this petition for a writ of certiorari be granted, and that finally the decree of the lower court be reversed and petitioner's motion to dismiss for lack of jurisdiction be sustained; and for such further relief as to this Honorable Court may seem proper.

Respectfully submitted,

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New Orleans, Louisiana,
April 30, 1947.

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TABLE OF CONTENTS.

	PAGE
OPINION BELOW	1
JURISDICTION	2
STATEMENT OF FACTS	2
STATUTORY PROVISIONS INVOLVED	7
SPECIFICATION OF ERRORS	13
ARGUMENT	14
I. A. The problems involved in foreign air transportation are chiefly political, having to do with foreign policy and national defense	14
B. The authority of the President in this field existed prior to the Act and emanates from the Constitution	21
C. The action of the President is not subject to judicial restraint	27
D. Review of the order involving foreign and overseas air transportation necessarily involves review of the President's action	33
E. Review of the Board's decision presents no case or controversy	36
F. Section 1006(a) must be interpreted to preclude review of orders for foreign and overseas transportation	40
II. Waterman has lost any right to review by tardy application	43
CONCLUSION	47

TABLE OF AUTHORITIES.

Cases.

	PAGE
Airways (Atlantic) Limited, 2 CAB 181	23
Ex parte Bakelite Corp., 279 US 438, 49 S. Ct. 411, 73 L. ed. 789 (1929)	36
Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission, 215 U. S. 216, 30 S. Ct. 86, 54 L. ed. 164 (1909)	37
Braniff v. Civil Aeronautics Board, 147 F2d (CCA 2-1941) 810	45, 46
Dakota Cent. Telephone Co. et al. v. State of South Dakota, 250 US 163, 39 S. Ct. 507, 63 L. ed. 910 (1919)	29
District of Columbia v. Eslin, 183 US 62, 22 S. Ct. 17, 46 L. ed. 85 (1901)	37
Doe, ex dem. Clark, et al. v. Braden, 16 How. 635, 14 L. ed. 1090 (1853)	29
Durand v. Hollins, 8 Fed. Cas. #4186 (1860)	33
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Federal Power Commission v. Pacific Power & Light Co., 307 US 156, 59 S. Ct. 766, 83 L. ed. 1180 (1939)	38, 39
Ferreira's Case, 13 How. 40, 14 L. ed. 42 (1852)	37, 38
Fok Young Yo v. United States, 185 US 296, 22 S. Ct. 686, 46 L. ed. 917 (1902)	29
Foster and Elam v. Neilson, 2 Pet. 253, 7 L. ed. 415 (1829)	29
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TABLE OF AUTHORITIES—(Continued)

Cases—(Continued)

	PAGE
Hayburn's Case, 2 Dall. 409, 1 L. ed. 436 (1792)	37, 38
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TABLE OF AUTHORITIES—(Continued)

Cases—(Continued)

PAGE

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United States v. Belmont, 301 US 324, 57 S. Ct. 758, 81 L. ed. 1134 (1937) 30, 43
United States v. George S. Bush & Co., 310 US 371, 60 S. Ct. 944, 84 L. ed. 1259 (1940) 27, 28, 42
United States v. Curtiss-Wright Export Corp., et al., 299 US 304, 57 S. Ct. 216, 81 L. ed. 255 (1936) 26, 27, 30, 31, 32, 43
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United States v. Jin Fuey Moy, 241 US 394, 36 S. Ct. 658, 60 L. ed. 1061 (1916) 42
United States v. Palmer, et al., 3 Wheat. 610, 4 L. ed. 471 (1818) 29
United States v. Pink, et al., 315 US 203, 62 S. Ct. 552, 86 L. ed. 796 (1942) 30
United States, et al. v. N. E. Rosenblum Truck Lines, 315 U. S. 50, 62 S. Ct. 445, 86 L. ed. 761 (1942) 42
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TABLE OF AUTHORITIES—(Continued)

United States Constitution.

	PAGE
Art. II, Secs. 1 and 2	22
Art. III, Sec. 2	36

United States Statutes.

Civil Aeronautics Act of 1938:	
Sec. 401, 52 Stat. 987; 54 Stat. 1235; 54 USCA 481	2
Sec. 801, 52 Stat. 1014; 54 Stat. 1238; 49 USCA 601	3, 8, 24, 26, 27, 34, 40
Sec. 1(19), and Sec. 1 (21), 52 Stat. 977; 54 Stat. 1233; 54 Stat. 1235; 49 USCA 401(19)	8, 9
Sec. 802, 52 Stat. 1014; 54 Stat. 1245; 49 USCA 602	10, 23, 24, 26
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Sec. 1006, 52 Stat. 1024; 54 Stat. 1235; 49 USCA 645	6, 7, 8, 40, 41, 42
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Appropriation Act of 1913	26
Merchant Marine Act of 1920	26
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Act of March 3, 1857 (11 Stat. 1872)	22

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Cable-Landing Licenses, Hearings on, S. 4301, 66th Cong., 3d Sess., 1921, p. 250	22
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75th Cong., 3d Sess. p. 6853 (1938)	24

TABLE OF AUTHORITIES—(Continued)

International Conventions, Treaties and Agreements.

PAGE

Agreement between the United States and Argentina, May 1, 1947 17
Agreement between the United States and Australia and New Zealand, December 3, 1946 17
Agreement between the United States and Belgium, April 5, 1946 17
Agreement between the United States and Brazil (Treaties and Other International Acts Series) October 6, 1946 17
Agreement between the United States and Canada (Executive Agreement Series 129), August 1, 1938 16
Agreement between the United States and Canada (Executive Agreement Series 457), February 19, 1945 17
Agreement between the United States and Chile, May 10, 1947 17
Agreement between the United States and China, December 20, 1946 17
Agreement between the United States and Columbia, February 23, 1929 16
Agreement between the United States and Czechoslovakia, (Treaties and Other International Acts Series), January 3, 1946 17
Agreement between the United States and Denmark (Executive Agreement Series 58), April 16, 1934 16
Agreement between the United States and Denmark, December 4, 1945 17

TABLE OF AUTHORITIES—(Continued)

International Conventions, etc.—(Continued)

PAGE

Agreement between the United States and Denmark (Treaties and Other International Acts Series), March 21, 1946 17

Agreement between the United States and Ecuador, January 8, 1947 17

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Agreement between the United States and France (Executive Agreement Series 152), August 15, 1939 ..... 16, 17

Agreement between the United States and France (Executive Agreement Series), March 27, 1946 17

Agreement between the United States and Germany, (Executive Agreement Series 38), June 1, 1932 16

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Agreement between the United States and Great Britain (Executive Agreement Series), February 11, 1946 ..... 17, 35

Agreement between the United States and India, November 14, 1946 17

Agreement between the United States and Ireland (Executive Agreement Series 463), February 1, 1945 17

Agreement between the United States and Ireland (Executive Agreement Series 460), February 15, 1945 17

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TABLE OF AUTHORITIES—(Continued)

International Conventions, etc.—(Continued)

PAGE

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Agreement between the United States and Norway (Executive Agreement Series 482), October 15, 1945 17

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Agreement between the United States and Portugal (Executive Agreement Series) December 6, 1945 17

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Agreement between the United States and Sweden, December 4, 1945 17

TABLE OF AUTHORITIES—(Continued)

International Conventions, etc.—(Continued)

PAGE

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Agreement between the United States and Syria, April 28, 1947 17

Agreement between the United States and Turkey (Treaties and Other International Acts Series), May 25, 1946 17

Agreement between the United States and the Union of South Africa (Executive Agreement Series 54), September 20, 1933 16

Agreement between the United States and the Union of South Africa, May 23, 1947 17

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PAGE

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Opinion by Attorney General Tom Clark to Secretary of State, June 18, 1946, US Av. R. 412 .....21, 33

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MAY IT PLEASE THE COURT:

OPINION BELOW.

The opinion of the court below is reported in 159 F. 2d 828 (R. 407), and the decision of the Civil Aeronautics Board upon which the proceedings of the court below are based is reported in 6 CAB 857 (R. 118).

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, chap. 229, Sec. 1, (28 U. S. C. 347(a), 43 Stat. 938). The decree of the lower court was rendered February 14, 1947. There was no application for rehearing, and Chicago and Southern Air Lines, Inc., sometimes referred to herein as C. & S., filed a petition for a writ of certiorari on May 6, 1947. Thereafter Civil Aeronautics Board, hereinafter referred to as the Board, filed a similar petition on May 13, 1947. Certiorari was granted to both applicants on June 16, 1947.[1] The C. & S. petition is No. 78 and the Board's petition is No. 88 on the docket of this Court.

STATEMENT OF FACTS.

In December, 1940, Waterman Airline, Inc., a subsidiary of Waterman Steamship Corporation, filed an application with the Board, under Section 401 of the Civil Aeronautics Act,[1a] for a certificate of public convenience and necessity to engage in air transportation between the United States and Puerto Rico.[2] Thereafter, Waterman Steamship Corporation, referred to herein as Waterman, was itself substituted as the applicant.[3]

Meanwhile, C. & S. filed with the Board an application seeking a certificate of public convenience and neces-

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[1] R. 414.

[1a] June 23, 1938, c. 601, Sec. 401, 52 Stat. 987; Reorg. Plan No. IV, Sec. 7, eff. June 30, 1940, 5 Fed. Reg. 2421, 54 Stat. 1235; 54 USCA 481.

[2] R. 42.

[3] R. 96.

sity to engage in air transportation between New Orleans and San Juan, (a) via Cuba, Haiti and the Dominican Republic, and (b) via Tampa, Miami, Cuba, Haiti and the Dominican Republic. C. & S. also filed applications for other routes in the Caribbean and the Central American areas.[4] The applications filed on behalf of C. & S. and of Waterman were consolidated with many others in a proceeding referred to as "Additional Service to Latin America".[5]

Before hearings were had on the applications, copies of the various applications were transmitted to the President of the United States[6] as required by Section 801 of the Act.[7] Hearings were held before examiners of the Board and briefs were filed with the examiners, who submitted their report on March 5, 1945, serving copies of the report on all parties. Exceptions and briefs were filed and all parties were allowed to present arguments before the Board from April 30 to May 5, 1945. After these arguments the Board prepared an opinion and proposed orders granting and denying certificates of public convenience and necessity, and, pursuant to Section 801 and before the publication of the opinion and proposed orders, the Board submitted them to the President for his approval. The President disapproved in part the opinion and proposed orders as submitted by the Board. The Board thereupon revised its opinion and its orders to conform with the President's directions.[8]

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[4] Cf. R. 232.
[5] Docket 525 of Civil Aeronautics Board.
[6] Cf. R. 124, the opinion of the Board.
[7] *Infra*, p. 8.
[8] Opinion of the Board, R. 125.

The changes did not apply to the applications made by Waterman or C. & S., but were directed to applications for other foreign routes which were a part of the general hearing on additional service to Latin America. There were four such changes made at the instance of the President. First, although the Board saw no necessity for the issuance of a certificate for an extended South American route, the President thought it advisable, and Braniff was, therefore, given one. Second, the Board denied the necessity of a second carrier between New York and Bermuda, but one of the members of the Board made a minority report recommending that National Airlines be given the route.[9] The President overruled the Board and it granted a second certificate, awarding it not to National, but to Eastern. Third, the Board found there was no necessity for a second carrier between Miami and San Juan, but the President thought a second certificate should be issued and one was granted Eastern Airlines. Fourth, the Board proposed to award the route between Los Angeles and Mexico City to Pan American Airlines, but the President preferred that the route be awarded Western Airlines and, accordingly, the award was made to the latter.

On May 17, 1946, the Board published its opinion which contains the modifications required by the President.[10] Included in that opinion was the decision that C. & S. be issued a certificate of public convenience and necessity for foreign and overseas air transportation of persons, property and mail "between the co-terminal points, New

[9] Opinion of the Board, R. 181.
[10] R. 118-289.

Orleans, La., and Houston, Tex., the intermediate point Havana, Cuba, and (a) beyond Havana, Cuba, the intermediate points Camaguey, Cuba, Port au Prince, Haiti, Ciudad Trujillo, Dominican Republic, and the terminal point San Juan, Puerto Rico, and (b) beyond Havana, Cuba, the intermediate points Kingston, Jamaica, Aruba, Netherlands West Indies, Curacao, Netherlands West Indies, and the terminal point Caracas, Venezuela."[11] At the same time, the Board denied the applications of Waterman and others for all or portions of the foregoing routes.[12] The Board also denied Waterman's previous motion of May 6, 1946,[13] requesting the Board to reopen the proceedings to receive further evidence and for reargument, on the proposed New Orleans-San Juan route.

On May 22, 1946, the President formally approved the decision of the Board to certificate petitioner and to deny the other applications.[14] On May 24, 1946, a copy of the Board's decision, as approved by the President, was served upon Waterman, and on the same day the certificate was issued to petitioner.

On June 24, 1946, Waterman filed a request for rehearing.[15] The rules of the Board, which were promulgated under Section 1005 of the Act,[16] provide that a petition for rehearing shall not operate as a stay of the effective date of the order sought to be modified or vacated, unless specially so ordered by the Board.[16a]

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[11] R. 206-211; R. 258; R. 269, et seq.
[12] R. 263.
[13] R. 114, et seq.
[14] R. 263.
[15] R. 291, et seq.
[16] *Infra*, pp. 12, 13.
[16a] R. 344.

No stay of the Board's opinion of May 17, 1946, was requested by Waterman and none was ordered by the Board. Moreover, on July 12, 1946, less than sixty days after the rendition and the service of the opinion of the Board, the Board denied the application for a rehearing.[17]

Thereafter, on September 6, 1946, considerably more than sixty days after the rendition and service of the Board's opinion, Waterman filed a petition in the court below, asking for a review of the foregoing action by the Board.[18]

After the expiration of sixty days, a petition may be filed in the Circuit Court of Appeals only upon leave of that court after a showing of reasonable grounds for failure to file the petition theretofore.[19] No such showing was made by Waterman and the court was not called upon and did not make such a finding in that regard.

The Board filed a motion to dismiss the petition to review for lack of jurisdiction.[20] After being granted leave by the court to intervene, C. & S. also moved to dismiss Waterman's petition to review.[21]

The motion to dismiss filed by C. & S. was predicated, in part, on the ground that the court below lacked jurisdiction to review an award, approved by the President of the United States, granting a certificate of public convenience and necessity for overseas and foreign trans-

[17] R. 328 et seq.
[18] R. 1.
[19] Cf. Section 1006(a) of the Act, *infra*, p. 7.
[20] R. 27.
[21] R. 388.

portation. The motion to dismiss was also predicated on the ground that the Waterman petition for review was not filed within the sixty-day period allowed under Section 1006 of the Act.

After hearing, the court below rendered its decision denying the motions to dismiss filed by C. & S. and the Board. In doing so, the court recognized [22] that its opinion was diametrically opposed to that of the Second Circuit Court of Appeals in *Pan American Airways Company v. Civil Aeronautics Board.*[22a] As stated, certiorari was granted by this Court.[23]

STATUTORY PROVISIONS INVOLVED.

This proceeding arises under the Civil Aeronautics Act. Sections 1006, 801, 802, 1102, and 1005, of that Act, as well as Section 6 of the Air Commerce Act of 1926, are pertinent to the issues raised. Section 1006 (a) provides:[24]

> "Any order, affirmative or negative, issued by the Board under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in Section 801 of this chapter, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed with-

[22] R. 407 at 411.
[22a] 121 F. (2d) 810.
[23] R. 414.
[24] June 23, 1938, c. 601, Sec. 1006, 52 Stat. 1024; Reorg. Plan No. IV, Sec. 7, eff. June 30, 1940, 5 Fed. Reg. 2421, 54 Stat. 1235; 49 USCA 646.

> in sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore."

It is conceded that the order sought to be reviewed is not an order in respect of a "foreign air carrier" which is defined in Section 1(19) of the Act:[25]

> "'Foreign air carrier' means any person, not a citizen of the United States, who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in foreign air transportation."

Although C. & S. is not a "foreign air carrier", as defined by the Act, the certificate issued was a certificate subject to the approval of the President under Section 801, which provides:[26]

> "The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under Section 402, shall be subject to the approval of the President. Copies

[25] June 23, 1938, c. 601, Sec. 1(19), 52 Stat. 977; Reorg. Plan No. III, Sec. 7, eff. June 30, 1940, 5 Fed. Reg. 2109, 54 Stat. 1233; Reorg. Plan No. IV, Sec. 7, eff. June 30, 1940, 5 Fed. Reg. 2421, 54 Stat. 1235; 49 USCA 401(19).

[26] June 23, 1938, c. 601, Sec. 801, 52 Stat. 1014; Reorg. Plan No. III, Sec. 7, eff. June 30, 1940, 5 Fed. Reg. 2109, 54 Stat. 1233; 49 USCA 601.

of all applications in respect of such certificates and permits shall be transmitted to the President by the Civil Aeronautics Board before hearing thereon, and all decisions thereon by the Civil Aeronautics Board shall be submitted to the President before publication thereof. . . ."

The certificate granted to C. & S. provides for overseas and foreign air transportation which are defined in the Act by Section 1(21)(b) and (c). Section 1 (21) provides as follows:[27]

"'Interstate air transportation', 'overseas air transportation', and 'foreign air transportation', respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

"(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the air space over any place outside thereof or between places in the same Territory or possession (except the Philippine Islands) of the United States, or the District or Columbia;

"(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

[27] For complete citation see note 25.

> "(c) a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation."

C. & S. will attempt to show that an order for foreign and overseas transportation subject to the approval of the President is not reviewable because the court may not review the action of the President in the exercise of the powers given him by the Constitution to conduct our foreign affairs and to act in the capacity of Commander-in-Chief of the armed forces. C. & S. contends that the order is the result of the combined decisions of the Board and the President and that a review thereof necessarily involves the review of the President's action. Finally, C. & S. contends that if the action of the Board can be dissociated from that of the President, the order of the Board is not final and presents no "case or controversy".

In interpreting Section 801, attention will be called to Section 802 and Section 1102 as illustrations of the statutory pattern. Section 802 provides as follows:[28]

> "The Secretary of State shall advise the Board of, and consult with the Board concerning, the negotiation of any agreements with foreign governments for the establishment or development of air navigation, including air routes and services
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> "

[28] June 23, 1938, c. 601, Sec. 802, 52 Stat. 1014; Reorg. Plan No. IV, Sec. 7, eff. June 30, 1940, 5 Fed. Reg. 2421, 54 Stat. 1235; 49 USCA 602.

Section 1102 provides as follows:[29]

> "In exercising and performing its powers and duties under this chapter, the Board shall do so consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country or foreign countries, shall take into consideration any applicable laws and requirements of foreign countries and shall not, in exercising and performing its powers and duties with respect to certificates of convenience and necessity, restrict compliance by any air carrier with any obligation, duty, or liability imposed by any foreign country: *Provided*, That this section shall not apply to any obligation, duty, or liability arising out of a contract or other agreement, heretofore or hereafter entered into between an air carrier, or any officer or representative thereof, and any foreign country, if such contract or agreement is disapproved by the Board as being contrary to the public interest."

This country recognizes no freedom of the air, as will be seen in Section 6 of the Air Commerce Act of 1926, which provides:[30]

> "(a) The United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the air space above the United States, including the air space above

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[29] June 23, 1938, c. 601, Sec. 1102, 52 Stat. 1026; Reorg. Plan No. IV, Sec. 7, eff. June 30, 1940, 5 Fed. Reg. 2421, 54 Stat. 1235; 49 USCA 672.

[30] May 20, 1926, c. 344, Sec. 6, 44 Stat. 572, as amended June 23, 1938, c. 601, Sec. 1107(i)(1)(3, 4, 5), 52 Stat. 1028; Reorg. Plan No. IV, Sec. 7, eff. June 30, 1940, 5 Fed. Reg. 2421, 54 Stat. 1235; 49 USCA 176.

all inland waters and the air space above those portions of the adjacent marginal high seas, bays, and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction. Aircraft a part of the armed forces of any foreign nation shall not be navigated in the United States, including the Canal Zone, except in accordance with an authorization granted by the Secretary of State.

"(b) Foreign aircraft not a part of the armed forces of the foreign nation shall be navigated in the United States only if authorized as hereinafter in this section provided.

"(c) If a foreign nation grants a similar privilege in respect of aircraft of the United States, and/or airmen serving in connection therewith, the Civil Aeronautics Board may authorize aircraft registered under the law of the foreign nation and not a part of the armed forces thereof to be navigated in the United States. No foreign aircraft shall engage in air commerce otherwise than between any State, Territory, or possession of the United States (including the Philippine Islands) or the District of Columbia, and a foreign country."

In support of the second phase of this proceeding, dealing with the failure of Waterman to file its petition to review within the period allowed, attention is called to Section 1005 of the Civil Aeronautics Act:[31]

"Except as otherwise provided in this chapter, all orders, rules, and regulations of the Board

[31] June 23, 1938, c. 601, Sec. 1005, 52 Stat. 1023; Reorg. Plan No. IV, Sec. 7, eff. June 30, 1940, 5 Fed. Reg. 2421, 54 Stat. 1235; 49 USCA 645(a).

shall take effect within such reasonable time as the Board may prescribe, and shall continue in force until its further order, rule, or regulation, or for a specified period of time, as shall be prescribed in the order, rule, or regulation: *Provided*, That whenever the Board is of the opinion that an emergency requiring immediate action exists in respect of safety in air commerce, the Board is authorized, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other form of pleading by the interested person or persons, and with or without notice, hearing, or the making or filing of a report, to make such just and reasonable orders, rules, or regulations, as may be essential in the interest of safety in air commerce to meet such emergency: *Provided further*, That the Board shall immediately initiate proceedings relating to the matters embraced in any such order, rule, or regulation, and shall, insofar as practicable, give preference to such proceedings over all others under this chapter."

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred—

(1) In holding that it had jurisdiction to review a decision of the Civil Aeronautics Board, approved by the President, under Section 801 of the Act, granting a certificate of public convenience and necessity for overseas and foreign air transportation;

(2) In holding that Waterman's petition for review was timely filed under Section 1006 of the Act;

(3) In failing to grant the motion to dismiss filed by C. & S.

ARGUMENT.

I.

A. The problems involved in foreign air transportation are chiefly political, having to do with foreign policy and national defense.

International air transportation became a problem only following World War I. During that conflict the airplane first emerged as a competent medium of transportation, but it also emerged as a proven weapon of war. Its potential as war materiel greatly colored its acceptance as an instrument of transportation and influenced formulation of the legal concepts for the control of international air travel.[32]

The chief problem growing out of the acceptance of the airplane as an instrument of international travel was the conflict between the proposed doctrine of freedom of the air and that of air sovereignty.[33] Directly after World War I, certain authorities urged acceptance of complete freedom in air transportation, but these few voices were

[32] Journal of Air Law and Commerce, October, 1939, V. 10, p. 439.
[33] "The Future of the Airways," by Sir Frederic Handley Page, *Foreign Affairs*, V. 22, No. 3, p. 403, at 407 (1944).

soon drowned out at the Paris Conference of 1919, and the convention concluded there recognized that each nation exercised sovereign rights in the air space above its territorial waters and its actual land mass.[34]

The United States was not a party to the Paris convention,[35] but it made a legislative declaration in 1926 in Section 6 (a) of the Air Commerce Act of that year to the effect that this country had complete sovereignty over all air space superadjacent to its territory and territorial waters.[36] The barriers thus erected by the United States, as well as by all other nations against foreign aircraft, were subject to penetration only through concession or license or permit from the particular sovereign power controlling the particular air space.

The penetration of national barriers involving as it does a sacrifice or relaxation of sovereign control presents in this aspect political and military problems that ultimately have to be worked out on the diplomatic levels. It is true that in the Pacific and in South America, Pan American Airlines gained a number of private unilateral concessions by dealing directly with the governments in-

[34] Article I of the Convention stated: "The high contracting parties recognize that every power has complete and exclusive sovereignty over the airspace above its territory and territorial waters." The Paris convention resulted in the relaxation of these air barriers by the individual signatories in return for reciprocal rights to penetrate the barriers set up by other signatories, but the reciprocity was limited to the right to make innocent flights over foreign territory, not regularly scheduled flights.

[35] The United States signed the convention but the Senate did not approve it. Thirty-three nations eventually subscribed to it and it has become basic public international law. The United States later became party to the Pan-American Convention for Air Navigation adopted in Havana in 1928, which embodied the basic principles of the Paris Convention.

[36] Cf. Section 6, *supra*, pp. 11, 12.

volved, but this was possible only because our State Department at that time allowed and encouraged this method and actually used its influence to implement the negotiations.[37]

For the most part, however, the inauguration of air services by American carriers to foreign points has been the aftermath of bilateral executive agreements between the United States and the foreign nation at which the terminal point was located or over which the flight was directed.

Prior to the second World War many such bilateral agreements were signed and they were instigated, for the most part, by American carriers who desired to penetrate the airspace of another country.[38] In each instance, the

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[37] Lissitzyn, Oliver James: *International Air Transport and National Policy*, Council of Foreign Relations (1942), pp. 385, 387. Cf. also "Legal Rules for International Aviation," by Charles S. Ryne, 31 Va. L. Rev. 267, 298 (1945). In the case of Columbia, the matter was handled through regular diplomatic channels and by executive agreement. The argument advanced for the early policy in Latin America of allowing American carriers to negotiate directly for their foreign privileges was that the United States was not committed to any reciprocal obligations limiting its sovereignty in favor of foreign carriers. This procedure was possible, however, only when a minor power was concerned. "Airways for Peace," by Edward Warner, Foreign Affairs, V. 23, p. 13. As of December 1, 1943, the Civil Aeronautics Board announced the abandonment by it and the State Department of the policy of unilateral private concession. C. A. B. memorandum, dated December 2, 1943.

[38] The following bilateral agreements were concluded before the war: Columbia—February 23, 1929; The Netherlands—May 24, 1933; Italy (Executive Agreement Series 24)—October 13, 1931; Germany (Executive Agreement Series 38)—June 1, 1932; Sweden (Executive Agreement Series 47)—October 9, 1933; Norway (Executive Agreement Series 50)—November 15, 1936; Union of South Africa (Executive Agreement Series 54)—September 20, 1933; Denmark (Executive Agreement Series 58)—April 16, 1934; Great Britain (Executive Agreement Series 76)—May 5, 1935; Irish Free State (Executive Agreement Series 110)—December 4, 1937; Canada (Executive Agreement Series 129)—August 1, 1938; France (Executive Agreement Series 152)—August 15, 1939; Liberia (Executive Agreement Series 166)—June 15, 1939.

United States, while not always giving equivalent privileges to the national aircraft of the other signatory, did make concessions. Since the last war an ever increasing number of such agreements has been executed.[39] Today the agreements usually describe the routes to be flown by the respective national aircraft, and empower the contracting nations to designate their own flag line to fly the route.[39a] This is, of course, all handled through diplomatic channels by the State Department, usually with consultation and assistance from the Board,[40] which is bound under Section 1102 of the Act to act in conformity with the executive agreements.

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[39] For example, agreement with Canada, February 19, 1945 (Executive Agreement Series 457), with Ireland, February 15, 1945 (Executive Agreement Series 460), with Ireland, February 1, 1945 (Executive Agreement Series 463), with Switzerland, August 3, 1945 (Executive Agreement Series), with Norway, October 15, 1945 (Executive Agreement Series 482), with Portugal, December 6, 1945 (Executive Agreement Series), with Great Britain, February 11, 1946 (Executive Agreement Series), with France, March 27, 1946 (Executive Agreement Series), with Belgium, April 5, 1946 (Treaties and other International Acts Series), with Brazil, October 6, 1946 (Treaties and other International Acts Series), with Czechoslovakia, Jan. 3, 1946 (Treaties and other International Acts Series), with Denmark, March 21, 1946 (Treaties and other International Acts Series), with Turkey, May 25, 1946 (Treaties and other International Acts Series), with Egypt June 15, 1946 (Treaties and other International Acts Series), with Lebanon, August 11, 1946 (Treaties and other International Acts Series), with China, December 20, 1946, with India, November 14, 1946; with Australia and New Zealand, December 3, 1946; with Peru, December 27, 1946; with the Philippines, November 16, 1946; with Uruguay, December 14, 1946; with Ecuador, January 8, 1947; with Paraguay, February 28, 1947; with Siam, February 26, 1947; with Denmark, December 4, 1945; with Sweden, December 4, 1945; with Argentina, May 1, 1947; with Chile, May 10, 1947; with Syria, April 28, 1947; with Union of South Africa, May 23, 1947.

[39a] Bilateral agreements of the Bermuda model entered into within the last two years almost without exception provide for the designation of a flag line by the obligee nation.

[40] For example, the bilateral agreement concluded with France on March 27, 1946, bears the signatures of the American Ambassador to France, a representative of the State Department and the Chairman of the Civil Aeronautics Board (then Mr. Pogue). Likewise, the agreement with Brazil bears the signature of our diplomatic representative and Mr. Landis, then chairman of the Board.

In Section 6(c) of the Air Commerce Act of 1926 Congress recognized the fact that successful air penetration by United States carriers required establishment of mutually reciprocal concessions. A recent report of the Air Coordinating Committee appointed by the President emphasizes the widespread acceptance of the principle of reciprocity in international air transportation.[41]

The practical aspect of the reciprocal nature of the bargaining process is illustrated by several recent decisions of the Civil Aeronautics Board. In one recent case involving the application of a foreign carrier for service between Venezuela and the United States, intervention was made by an American airline which was already servicing the same area. In disposing of this opposition and allowing the Venezuelan carrier the permit sought, the Board said:[42]

> "In making its decision in the Latin American Air Service case to authorize the United States air carriers to operate the routes there certificated, the board naturally took account of the prospect that the air lines of other states served by our air carriers would have an opportunity on a fair reciprocal basis to operate routes in the United States . . ."

In short, the natural and probable consequence of certificating a United States carrier to engage in foreign air transportation is the obligation to reciprocate by permit-

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[41] Report of the Air Coordinating Committee, House Doc. 148, 80th Cong., 1st Sess.; 1947 US Av. R. 124, 220. See also Secretary Marshall's statement of policy on reciprocity as of June 12, 1947. 1947 US Av. R. 265.

[42] Linea Aerea Taca De Venezuela, C. A., et al., Air Carrier Permits, Docket No. 2180; 7 CAB 317, 321 et seq. (1946).

ting a foreign carrier to fly a similar or the same route. In acting on an application by a United States carrier to engage in foreign transportation, the Board and the President therefore must inevitably make a silent but implicit decision on the future application of a foreign carrier seeking reciprocal privileges. For example, should a United States carrier apply for a route to a country with whom our relations are strained, the possibilities are that the certificate would be denied because the State Department would not be able to obtain air concessions from that country or because the price of such concessions would be equivalent landing rights in the United States, a price considered too high for reasons of military security and international policy.[43]

Thus, the inexorables of reciprocity require that considerations of national defense and of international policy which are involved in a decision to grant or deny a permit[44] to a foreign carrier to fly in the United States must be taken into equal account in a decision to grant or deny a certificate to a United States carrier to fly in foreign air transportation. There is, therefore, no more reason for the review of one than the other.

In many countries the flag carrier is owned or controlled by the state and operated, not as a profit-making

[43] A rapprochement between nations is usually sealed with an air transport agreement testifying to the absence of ostensible military and political suspicions. Thus, Germany was barred for several years after World War I from signing the Paris Convention. The Locarno Pact was followed by the Franco-German air transport accord and the Polish-German rapprochement of 1934 was accompanied by an air agreement. The instances are numerous. Cf. Lissitzyn, *op. cit. supra*, p. 398 et seq.

[44] United States carriers receive certificates; foreign carriers, permits.

enterprise, but as an instrument of that nation's foreign policy or propaganda.[45] German foreign air transport, for example, extended itself into South America with the obvious desire of political and ideological infiltration. In the Pacific Japanese civil airlines were used to hold together politically a widely diverse and farflung empire.[46] In the United States extension of services by United States carriers in Latin America has been encouraged to reinforce our Good Neighbor policy and solidify hemisphere defense. Mail subsidies are granted to United States carriers to stimulate air services and underwrite aeronautical developments and establishment of regular and familiar routes useful in the event of war. Thus, choice of an American flagline and its route contemplates the choice of an effective vehicle of positive as opposed to negative foreign policy.

As has been demonstrated, mere certification of a carrier is not enough. Landing rights must be obtained before service can be instituted. Landing rights can be obtained today only through the intervention of the President or his *alter ego*, the State Department, who is alone in a legal position to negotiate with foreign governments.[47]

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[45] "The Diplomacy of Air Transport," by Oliver F. Lissitzyn, *Foreign Affairs*, V. 19, No. 1, pp. 156, 161 *et seq.* (1940); and "Wings for the Trojan Horse," by Melvin Hall and Walter Peck, *Foreign Affairs*, V. 19, No. 2, p. 347 (1941).

[46] "Air Transport and World Organization," by John C. Cooper, Yale Law Journal, V. 55, p. 1191 at 1192 (1946).

[47] This has been clearly established since the Genet incident during Jefferson's administration when the President replied to Genet's request for an exequatur for a consul whose commission was addressed to "the Congress of the United States" that, "as the President is the only channel of communication between the United States and foreign nations, it is from him alone that foreign nations or their agents are to learn what is or has been the will of the nation . . ." *Writings of Thomas Jefferson* (Mem. ed.), IX, 256, cited in Corwin, Edward S.: *The President: Office and*

The State Department is, accordingly, placed in the position of actively sponsoring the institution by a particular United States carrier of a foreign service. The carrier receives official sanction. It is the carrier designate of this nation. It becomes particularly important, therefore, that the carrier should be acceptable to the President, or the State Department, and to the government of the foreign state.

B. The authority of the President in this field existed prior to the Act and emanates from the Constitution.

In the enactment of Section 801 Congress invoked the constitutional functions of the President. It did not delegate to him its legislative powers in the control of foreign commerce.[48] As shall be shown the President had exercised authority in the selection of foreign route patterns, carriers, etc., before passage of the Act in 1938, and Congress needed only to recognize these powers and to set up the machinery for their effective coordination with the work of the Board.[49]

The authority of the President in regulating international air transportation came, not from Congress, but

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Powers, New York University Press (2d ed. rev.), p. 209, note 28, p. 402. Congress recognized the President's prerogative in the Logan Act. 18 USC Sec. 5. Cf. Corwin, *op. cit. supra*, 208 et seq.; Willoughby on the *Constitution of the United States*, (2d ed.), V. 1, pp. 537 et seq.; Chief Justice Marshall described the President as "the sole organ of the nation in its external relations."

[48] John Bassett Moore pointed out that since Congress "possesses no power whatever to make international agreements, it has no such power to delegate." 60 Proc. Am. Phil. Soc. XV-XVI, 1921.

[49] See the opinion of Attorney General Tom C. Clark rendered June 18, 1946, advising the Secretary of State that the bilateral transport agreements were valid and not in conflict with the Act. 1946 US Av. R. 412 et seq. In that opinion the writer said: "The ultimate decision, of course, under section 801, must be made by the President."

from those phrases of the Constitution (1) recognizing him as Commander-in-Chief,[50] (2) empowering him to receive ambassadors and public ministers,[51] (3) depositing in him the power of the Executive,[52] and (4) authorizing him to negotiate treaties.[53]

There is a strong analogy between the matters under discussion and the experience of the President with regard to the landing of submarine cables. Occasional special acts of Congress authorized the early trans-Atlantic cables,[54] but in the absence of express statutory authorization, the President after 1869 [55] exercised his constitutional power as Chief Executive in charge of our foreign affairs to grant or refuse permits for the landing of cables and to insert conditions in such permits.[56]

Prior to the Civil Aeronautics Act of 1938 the President, through the State Department, had concluded bilateral executive agreements with Columbia, with the Netherlands, with Germany, with Sweden, with Norway, with the Union of South Africa, with Denmark, with Great Britain and with the Irish Free State.[57] By these agree-

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[50] Constitution, Art. II, Section 2, Parag. 1.
[51] Constitution, Art. II, Section 2, Parag. 2.
[52] Constitution, Art. II, Section 1, Parag. 1.
[53] Constitution, Art. II, Section 2, Parag. 2. For a discussion at length on the broad powers assumed by the President on the basis of the four clauses cited see Corwin: *The President's Control of Foreign Affairs*, Princeton University Press, 1917; Corwin, *The President: Office and Powers*, Chapters III, IV, V, and VI; and "Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy," by Myres S. McDougal and Asher Lans, 54 Yale Law Journal 181 at 246 et seq. (1945).
[54] See Act of March 3, 1857 (11 Stat. 1872). The special acts are collected in Cable-Landing Licenses, Hearings on, S. 4301, 66th Cong., 3d Sess., 1921, 250-252.
[55] President Grant established the precedent. See Corwin, The President, *op. cit. supra*, p. 244.
[56] Lissitzyn, *op. cit. supra*, pp. 31 et seq.
[57] See note 38.

ments the President obligated this county to permit regular transport flights and landing privileges to carriers of the other contracting parties in exchange for similar concessions to United States carriers. Most of the executive agreements provided that the foreign flag line, applying for a permit under a bilateral agreement, would apply through *diplomatic channels*.[58] Thus, the granting of permits to foreign carriers and the general designation of commercial routes for United States carriers were, even prior to 1938, matters determined by the President and the State Department without congressional grant.[59]

The activities of the Board in the field of international air transportation had to be channelled through and limited by the President and the State Department because the Board could not assume the prerogative of the Executive to conduct our foreign affairs, nor could it assume his obligations as Commander-in-Chief charged with the duty to provide for national security. As a matter of fact, Section 802 of the bill introduced in Congress originally provided that the Secretary of State should initiate and conduct negotiations and conclude such agreements as would be satisfactory to the Authority (now called the Board) and the President. This draft of Section 802 was discarded because the power to engage in diplomatic negotiations was already vested in the President under the Constitution and there was some question whether the proposed provision constituted a limitation on that power by subjecting it to the approval of the

[58] Lissitzyn, *op cit. supra*, pp. 377 and 386.

[59] In 1935 the agreement with Great Britain went so far as to name specifically the Imperial Airways as the British carrier. The CAB later gave effect to this nomination through diplomatic exchange. CAB orders, Serial No. 625, July 29, 1940, 2 CAB 181.

Authority.[60] Instead, Congress carefully avoided any intrusion into the Executive power by directing the Board to act consistently with the President. Sections 801, 802 and 1102.

Congress was concerned with the military significance of foreign air transportation and it was well aware of the fact that the Board did not have access to secret military and diplomatic information nor the means of coordinating military with diplomatic information. The President, as Commander-in-Chief and as Executive in charge of foreign affairs, is alone in that rare position.

Thus, the then Senator Truman, commenting on the President's power under Section 801 of the bill, said,[61] "This check is required by the very delicate questions of national defense which are involved."

Testifying before the House Committee on Interstate and Foreign Commerce, Clinton M. Hester had this to say of Section 801:[62]

> "Take for instance, this situation with reference to the provision that the President shall have authority to approve certificates of public convenience and necessity for American flag airplanes flying abroad . . . In flying to foreign countries, from a national defense and international relations standpoint, it is very important that the President, the War Department, and the Navy Department, as well as the State Department, have

[60] See the debates on Section 802. 75th Cong., 3d Sess., pp. 6853, 6854 (1938).
[61] 75th Cong., 3d Sess., p. 672, May 12, 1938.
[62] Hearings on H. R. 9738, 75th Cong., 3d Sess., pp. 147-148.

something to say about where air bases will be established in foreign countries."

It is not to be denied that the establishment of airlines in foreign countries presents economic as well as political considerations. Congress apparently recognized this fact in drafting the Act. To the Board Congress delegated its power to regulate foreign commerce, setting up certain standards for the Board to follow in selecting the proper carriers to bear the United States flag in foreign transportation. But Congress likewise recognized that foreign air travel involves political considerations which were already within the province of the President under his constitutional powers as Chief Executive in charge of foreign affairs. Section 801 of the Act is not only a recognition of the President's power as the Chief Executive in charge of our foreign affairs, but, a recognition as well of the fact that in case of conflict between the economic and the political considerations, the political ends must first be served. Thus, where in the opinion of the Board a particular carrier may from the standpoint of economic factors be the desirable applicant for a particular foreign and overseas route, if the President feels that political considerations require the denial of that carrier's application, or the certification of another, the President's choice must prevail.

Often there is an overlapping of the authority given by the Constitution to Congress to regulate foreign commerce and legislate in the foreign field and the authority given to the President to conduct foreign relations.[63] In

[63] See Corwin, The President, *op cit. supra*, Chap. VI.

such instances, Congress may entrust to the President, who already has "cognate" powers, complete discretion covering the entire field. *United States v. Curtiss-Wright Export Corporation.*[64] That is precisely what Congress did in the enactment of Section 801 of the Civil Aeronautics Act.

If Congress had made no provision for the President's control over foreign air transportation and had not included Sections 801, 802 and 1102 in the Act, there would be presented the necessity of reconciling the "logical incompatibles" as Professor Corwin has described them[65]—the unlimited power of the President and the plenary power of Congress in foreign relations.[66] But Congress did recognize the President's power in this Act, as Sections 801, 802 and 1102 bear witness.[67] Having thus entrusted the President with complete discretion in the field of foreign air transportation, Congress did not and could not have intended to direct the Judiciary, which is the one branch of government given no responsibility in the field of foreign relations, to interfere with the President in the exercise of his complete authority in that field.[67a]

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[64] 299 U. S. 304, 57 S. Ct. 216, 81 L. ed. 255 (1936).

[65] Corwin, The President, *op. cit. supra*, p. 222.

[66] By the Appropriation Act of 1913 the Congress attempted to forbid the President the right to participate in an international conference without authorization, but the attempt was unsuccessful. Likewise, in the Merchant Marine Act of 1920 the Congress "authorized and directed" President Wilson to terminate portions of certain treaties. President Wilson flatly refused on the ground that Congress did not have the constitutional power to direct him.

[67] "It can scarcely be denied that the President needs no new powers beyond those expressly granted to him in the document (the Constitution) to enable him to conduct negotiations with other governments and that he has exclusive power to conduct such negotiations." "Treaties and Congressional-Executive or Presidential Agreements," supra, 54 Yale Law Journal 222.

[67a] Prof. Corwin says that the struggle for power between Congress and the President in external affairs presents a political question and "the Court refrains from thrusting its oar into the troubled waters." Corwin, The President, *op. cit. supra*, p. 252.

C. The Action of the President is not Subject to Judicial Restraint.

An analysis of Section 801 must reveal that it was not enacted to provide an intermediate review of the Board's findings. Had Congress intended to provide another step in the review of the Board's action, it would not have confined this review to foreign and overseas air transportation. Moreover, Congress would not have burdened the President of the United States with a judicial function.

Clearly Congress intended that the President act in his executive capacity when approving or disapproving the issuance of certificates or permits for foreign air transportation. Of necessity the President is not limited in his action by the evidence and information contained in the record before the Board. He may base his decision on matters outside the record such as military and diplomatic information of a confidential and secret nature. The basis of the President's action is, therefore, not a matter of record and in the absence of such a record, his decision cannot possibly be susceptible of review.[68]

A similar interpretation of a similar statute was made by the Court in *United States v. George S. Bush & Co.*[69] In that case the authority of the President to increase duties on imported products to equalize their costs with that of domestic products, was held to be final and not subject to judicial review. There, the authority

[68] United States v. Curtiss-Wright Corp., *supra;* United States v. Bush & Co., 310 U. S. 371, 60 S. Ct. 944, 84 L. ed. 1259 (1940).
[69] United States v. Bush, ibid.

to the President was legislative only. The statute under consideration was the Tariff Act, which was enacted under the power of Congress to regulate foreign commerce. Congress had provided that a commission should hold hearings on the readjustment of duties and submit its findings to the President, and the President was then empowered to issue a proclamation approving the rates of duties and changes in classification specified in any report of the Commission if in his judgment such rates and changes were shown by such investigation to be necessary to equalize the difference in the cost of production of the domestic and foreign article. The Court said:[70]

> "For the judiciary to probe the reasoning which underlies the proclamation would amount to a clear invasion of the legislative and executive domain."

The instant case presents a much stronger ground for judicial abstention. Here the President is acting, not under administrative authority granted by Congress in the exercise of its power over foreign commerce, but under his own constitutional authority as the executive in charge of our foreign and diplomatic affairs on the political level.

The rule is well recognized that the judiciary will not review action of the political branches of the government. This rule grows technically from the doctrine of separation of powers and practically out of political exigency. The original premise was stated by Chief Justice Marshall in *Marbury v. Madison*:[71]

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[70] Ibid.
[71] 1 Cranch 137, 2 L. ed. 60 (1803).

> "By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his conscience . . . Whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political: they respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive."

That the conduct of our foreign relations is a political matter within the control of the executive is clearly established by the decisions of this Court.[72] Thus, in *Oetjen v. Central Leather Company*, the Court said:[73]

> "The conduct of the foreign relations of our Government is committed by the Constitution to the executive and legislative—'the political'—departments of the government and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision . . ."

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[72] Dakota Cent. Telephone Co. v. State of South Dakota, 250 US 163, 39 S. Ct. 507, 63 L. ed. 910 (1919); Fok Young Yo v. United States, 185 US 296, 22 S. Ct. 686, 46 L. ed. 917 (1902); Doe, ex dem. Clark, et al. v. Braden, 16 How. 635, 14 L. ed. 1090 (1853); United States v. Palmer, 3 Wheat. 610, 4 L. ed. 471 (1818); Foster and Elam v. Neilson, 2 Pet. 253, 7 L. ed. 415 (1829); Jones v. United States, 137 US 202, 11 S. Ct. 80, 34 L. ed. 691 (1890); Underhill v. Hernandez, 168 US 250, 18 S. Ct. 83, 42 L. ed. 456 (1897); Guaranty Trust Co. of N. Y. v. United States, 304 US 126, 58 S. Ct. 785, 82 L. ed. 1224 (1938); Kiyoshi Hirabayashi v. United States, 320 US 81, 63 S. Ct. 1375, 87 L. ed. 1774 (1943); State of Russia v. National City Bank of N. Y., 69 F2d (CCA 2-1934) 44.

[73] Oetjen v. Central Leather Co., 246 US 297, 38 S. Ct. 309, 62 L. ed. 726 (1918).

In *United States v. Curtiss-Wright Export Corporation, supra*, there was an attack upon a joint resolution of Congress authorizing the President to declare an embargo on the export of arms and munitions to the belligerents in the Grand Chaco dispute if in his judgment the embargo would promote peace. Curtiss-Wright, convicted of a violation of the embargo proclaimed by the President, attacked the resolution as an invalid delegation of legislative power since it set up no adequate standard to guide the President in his decision to proclaim the embargo. The Court affirmed the conviction, saying that the President's power in the field of international relations derived from his position as Executive exercising the sovereign functions of a state in its external relations, and indicated that the President could have prohibited the export of arms and munitions to the Chaco even in the absence of the joint resolution. It said:[74]

> "Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiations the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of

[74] United States v. Curtiss-Wright Export Corp., *supra*. See also United States v. Belmont, 301 U. S. 324, 57 S. Ct. 758, 81 L. ed. 1134; United States v. Pink, 315 US 203, 62 S. Ct. 552, 86 L. ed. 796 (1942).

March 7, 1800, in the House of Representatives, 'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations'. Annals, 6th Cong. Col. 613. The Senate Committee on Foreign Relations at a very early day in our history (February 15, 1816), reported to the Senate, among other things as follows:

"'The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution. The committee considers this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility and thereby to impair the best security for the national safety. The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.' 8 U. S. Sen. Reports, Comm. on Foreign Relations, p. 24.

"It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its

exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty—a refusal the wisdom of which was recognized by the House itself and has never since been doubted. . . ."

In the instant case we too are dealing with "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress."

As in the cited case, the President's action here is not subject to judicial review.[74a]

D. Review of the order involving foreign and overseas air transportation necessarily involves review of the President's action.

Waterman takes the position that the Court is asked to review the order of the Board, not the President. C. & S. has attempted to show that the order granting a certificate for foreign and overseas air transportation is actually the order of the President, and that the Board acts merely in an advisory capacity.[75]

The court below conceded that the President's action was not subject to review and that it was not necessary for him to state reasons for his decision.[76] It assumed, however, that the conclusions of the Board could be independent of the President's action and that the decision of the Board in its pristine state could be reviewed before the President took action upon it.

The court below erred in assuming that the decision of the Board could be dissociated as an entity from that of the President. The machinery of Section 801 makes this

[74a] See also the authorities showing the inability of the court to enjoin the President. Z & F Assets Realization Corp. v. Hull, 311 US 470, 61 S. Ct. 351, 85 L. ed. 288 (1941); Mississipoi v. Johnson, 4 Wall. 475, 18 L. ed. 437 (1866); Durand et al. v. Hollins, 8 Fed. Cas. #4186 (1860). Waterman is attempting here to obtain an order enjoining the issuance and the enforcement of the certificate issued C. & S. by Presidential action.

[75] This view is expressed by Attorney General Tom Clark, when he says: "The ultimate decision, of course, under Section 801, must be made by the President." Opinion to Secretary of State, June 18, 1946, 1946 US Av. R. 412, 414. See also, Cooper, John C: *The Right to Fly*, Henry Holt & Co., 1947; p. 188, to the same effect.

[76] R. 411.

a legal and a practical impossibility. That Section requires that copies of all applications for foreign and overseas transportation be submitted to the President before hearing thereon, and prohibits the Board from publishing decisions thereon until after they have been submitted to the President for his approval. The decision thus published, therefore, is not the Board's pure self-generating strain but the product of collaboration between the Board and the President.

In the case of Additional Service to Latin America, for example, the action of the President brought about four changes in the Board's decision, as has been pointed out.[77] For example, the Board recommended that Pan American be given a route between Los Angeles and Mexico City. According to the statement contained in the Board's opinion, the President considered it advisable to award this route to Western Airlines.[78] There was no public explanation of the President's action. Since Section 801 requires that the decisions of the Board be communicated to the President before publication, the decision of the Board to award the route to Pan American was made known to the President before the order granting the route was awarded. The President demanded the change, and accordingly, when the decision of the Board was pub-

[77] In connection with these changes the Board's opinion contains the following statement: ". . . Pursuant to that section [801], the Board submitted its opinion and order and certificates in the present proceeding to the President of the United States. The President, acting in accordance with his statutory authority under Section 801 of the Civil Aeronautics Act has advised the Board that because of certain factors relating to our broad national welfare and other matters for which the Chief Executive has special responsibility, he has reached conclusions which require the following changes in the Board's opinion: . . ." R. 125.

[78] R. 125, 170, 171.

lished and the order rendered, the route was awarded to Western Airlines. Assuming that Pan American wished to contest the award, it would clearly be asking for a review of the President's and not the Board's decision since the Board's recommendation was in Pan American's favor.

How much of the final decision is the decision of the Board and how much that of the President is impossible to determine. It is impossible to know whether the choice of C. & S. was primarily dictated by the Board, which took into account economic considerations, or by the President, who took into account political considerations, or, as must be generally the case, the result of mutual discussion and the weighing of the combined factors. Under such circumstances, the action of the Board cannot be dissociated from that of the President, and the review of one necessarily entails the review of the other.

Pertinent here is the application to this case of the Bermuda agreement entered into between the United States, acting through our State Department, and Great Britain, in February 1946. A segment of the route here under discussion was outlined in the agreement as a route to be served by a United States air carrier.[79] The United States was to designate the specific carrier to serve this route. Accordingly, the British government has been notified that C. & S. is the United States carrier designated for this route under the Bermuda Agreement.

[79] Route 11, Part B of Annex No. 3 provides that a 'United States carrier shall serve a route between New Orleans and Houston and points in Cuba, Jamaica, Aruba, and South America. 1946 US Av. R. 108, 120.

Assuming that the court below has the power to review the decision awarding the certificate to C. & S., there is doubt that the Board alone on remand or the court on review could require the issuance of the certificate to a carrier other than C. & S. in view of Section 1102, which requires that the Board act consistently with any agreement in force between the United States and any foreign country.

E. Review of the Board's decision presents no case or controversy.

Assuming that the action of the Board can be dissociated from the decision of the President, the so-called order of the Board would not be subject to review because the action of the Board is not final and, therefore, presents no case or controversy.

The action on an application for foreign air transportation is not complete in the sense that a certificate may issue before the President has acted. Review of any steps leading up to the President's action, whether it be review of an examiner's report or of the Board's recommendations, would merely result in an advisory opinion.

Article III, Sec. 2 of the Constitution extends the judicial power only to "cases" and "controversies". The Court is a constitutional court possessing only judicial powers.[80] Its function is restricted to adjudication of final decisions

[80] Ex parte Bakelite Corp., 279 US 438, 49 S. Ct. 411, 73 L. ed. 789 (1929); O'Donoghue v. United States, 289 US 516, 53 S. Ct. 740, 77 L. ed. 1356 (1933); Old Colony Trust Co. v. Comm'r, 279 US 716, 49 S. Ct. 499, 73 L. ed. 918 (1929).

in controverted matters. It does not have the power to render advisory opinions.[81]

The logic behind this judicial abstention is carefully set forth in one of the last opinions of Chief Justice Taney in *Gordon v. United States*. The question was whether the Court had power to review a decision of the Court of Claims under the Court of Claims Act. Sec. 14 of that act provided that no money should be paid out of the Treasury for any claims allowed by the Court of Claims until the Secretary of the Treasury should have approved the payment and Congress should have made an appropriation for it. Thus the Court of Claims had no power to enforce its judgments. The Secretary of the Treasury and Congress had to approve its findings, the same as the President here has to approve the decisions of the Board on foreign and overseas certificates.

The Gordon case was argued twice and Chief Justice Taney died between the two hearings. Before his death, he had written an opinion on the first argument. The official and final opinion[82] of the court was delivered by the then Chief Justice Chase, but reference was made to Chief Justice Taney's reasoning and his opinion was reprinted in full in the Appendix of a later volume of re-

[81] Hayburn's Case, 2 Dall. 409, 1 L. ed. 436 (1792); Ferreira's Case, 13 How. 40, 14 L. ed. 42 (1851); Gordon v. United States, 2 Wall. 561, 17 L. ed. 921 (1865) and 117 US 697, appendix; In re Sanborn, 148 US 222, 13 S. Ct. 577, 37 L. ed. 429 (1893); Muskrat v. United States, 219 US 346, 31 S. Ct. 250, 55 L. ed. 246 (1911); Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission, 215 US 216, 30 S. Ct. 86, 54 L. ed. 164 (1909); United States v. Jefferson Electric Mfg. Co., 291 US 386, 54 S. Ct. 443, 78 L. ed. 859 (1934); District of Columbia v. Eslin, 183 US 62, 22 S. Ct. 17, 46 L. ed. 85 (1901). See also. "Advisory Opinions," Encyclopedia of Social Sciences, V. 1, pp. 475, 478.

[82] 2 Wall. 561, 17 L. ed. 921 (1865).

ports.[83] As pointed out there the Court cannot express an opinion "where its judgment would not be final and conclusive upon the rights of the parties[84] . . . The power conferred on this court is exclusively judicial, and it cannot be required or authorized to exercise any other."[85]

The *Gordon* case is factually similar to two earlier cases, *Ferreira's* case[86] and *Hayburn's* case,[87] both of which involved statutes by the provisions of which the action of the court was subject to acceptance by an administrative official. In both cases, the Court refused to exercise its judicial powers. The same position has been taken in numerous cases following the *Gordon* case.[88]

Federal Power Commission v. Pacific Power & Light Company[89] is relied on by Waterman in opposing the contention that no case or controversy is presented. Waterman's reply presupposes that the "case or controversy" question goes off on the right of the *court* to enforce its decision. If this were the only test, then clearly the court below was correct in pointing out that,[90] "Courts try criminal cases notwithstanding an executive pardon may frustrate a conviction. They constantly reach conclusions in all kinds of cases undeterred by the chance that a higher court may disapprove their orders."

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[83] 117 US 697, appendix.
[84] Ibid, p. 702.
[85] Ibid, p. 699.
[86] 13 How. 40, 14 L. ed. 42 (1851).
[87] 2 Dall. 409, 1 L. ed. 436 (1792).
[88] In re Sanborn, 148 US 222, 13 S. Ct. 577, 37 L. ed. 429 (1893); cf. United States v. Jefferson Electric Mfg. Co., 291 US 386, 54 S. Ct. 443, 78 L. ed. 859 (1934). See also note 81, *supra*.
[89] 307 US 156, 59 S. Ct. 766, 83 L. ed. 1180 (1939).
[90] R. 412.

But, it is submitted that the test for the determination of the existence of a case or controversy is not whether the decision or the action the court is asked to review is enforcible by the reviewing court itself, but whether it is enforcible in its then existing form by any court, agency, body or tribunal. In other words, the matter, when presented to the court, must have matured into finality, even though the finality be relative and subject to conditions subsequent such as judicial review, executive pardon and the like.

Thus, in the *Federal Power Commission* case, the Commission had definitely announced that it would not grant permission for the merger sought by the plaintiffs. If no review had been taken from that order it would have been final and conclusive under the statute controlling the case. Likewise, when a criminal court renders a judgment condemning a defendant, that judgment is final and exigible at that stage, and if no appeal is taken and no pardon granted, it will be executed.

Here, the Board does not have the power under the statute to render a decision which is independently virile and conclusive. No certificate can issue without supplementary action by the President. His action is a condition precedent to the finality of the order. It is not elective; it is mandatory.

The decision of the Board alone does not present a case or controversy because it is not a final decision in the sense that the Board's action alone is not a complete action which could lead to an enforcible result.

F. Section 1006 (a) must be interpreted to preclude review of orders for foreign and overseas transportation.

In interpreting Section 1006(a), attention is called to the original draft of that section, which read:

> "Any order, affirmative or negative, issued by the Authority under this Act except an order in respect of foreign air transportation approved by the President as provided in Section 801 of this Act, shall be subject to review . . ."

This draft was discarded and the section as adopted is as follows:

> "Any order . . . except an order in respect of ~~any foreign air transportation approved by the President~~ carrier subject to approval by the as provided in Section 801 . . ., shall be subject to review . . ."

From a comparison of this original draft with that which was finally passed, the court below concluded that it was the deliberate intention of Congress that certificates of foreign and overseas air transportation be omitted from the exception contained in Section 1006(a). C. & S. submits that this conclusion does not inevitably follow.

There was an obvious defect in the first draft of the section. The exception only extended to orders "approved" by the President. This meant that the orders of the Board under Section 801 could be reviewed before they were presented to the President or that if the President disapproved of an order of the Board, the Board's

order would be subject to review. For reasons that need no repetition here, neither of these two results was intended by Congress. It is, therefore, reasonable to conclude that Congress recognized the deficiencies in the original draft and, in an attempt to correct them, became enmeshed in a grammatical construction that produced still another defect which escaped congressional notice. The real reason [91] for the change in the provision is not determinative here.

Although section 1006(a) attempts to confer jurisdiction upon the court to review "any order" of the Board, the phrase "any order" must not be taken literally. The courts will certainly not review orders of the Board promulgating rules of practice in its hearings except as those rules may be incident to other matters before the Board, nor is it contemplated that the courts will review interlocutory orders.[92] Accordingly, it appears that orders involving foreign air carriers are not the only orders exempt from review.

Since the exception in 1006(a) is not exclusive it would not do violence to the provision to extend the exception

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[91] "Successive drafts of a statute are not stages in its development. They are separate things of which we can only say that they follow each other in a definite sequence and that one was not the other. But that fact gives us little information about the final form, since we really never know why one gave way to any other. There are doubtless many reasons, some of them likely enough to be personal, arbitrary and capricious—the fondness of the craftsman for a special locution, his repugnance to another, a misconception of the association of some word, a chance combination and often enough a mere inadvertence." "Statutory Interpretation"; by Max Radin, 43 Harvard Law Review, 863, 873 (1930).

[92] Federal Power Commission v. Metropolitan Edison Co., 304 US 375, 58 S. Ct. 963, 82 L. ed. 1408 (1938); Mallory Coal Co. v. Coal Commission, 99 F2d (CCA. DC-1938) 399.

Page

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

Nos. 1340 and 1371.

CHICAGO & SOUTHERN AIR LINES, INC.,

and

CIVIL AERONAUTICS BOARD, *Petitioners*,

v.

WATERMAN STEAMSHIP CORPORATION, *Respondent*.

On Petitions for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the court below is reported in 159 F. 2d 828 (R. 407). The opinion of the Civil Aeronautics Board which is the subject of this appeal is reported in 6 C.A.B. 857 (R. 118).

QUESTION PRESENTED.

Whether the petitions present substantial questions of general importance that should be settled by this court. Both petitioners present the question of whether an order

to orders subject to the President's approval. It is a settled rule of construction that a statute must be construed so as to give effect to its purpose and intent regardless of the language employed.[93] Equally pertinent is the rule that an unconstitutional interpretation of a statute will be avoided.[94] These rules preclude a literal construction here.

If given a literal reading, Section 1006(a) would allow a review of all orders except those relating to foreign air carriers. As has been demonstrated such an interpretation would place the courts in the position of reviewing the President in the exercise of his constitutional powers and of entertaining matters not in "case or controversy". It must be assumed that Congress did not pass an unconstitutional provision and that Section 1006(a) is susceptible of other interpretation.[95]

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[93] Markham, et al. v. Cabell, 326 US 404, 66 S. Ct. 193, 90 L. ed. 165 (1945); United States v. N. E. Rosenblum Truck Lines, 315 US 50, 62 S. Ct. 445, 86 L. ed. 671 (1942); United States v. American Trucking Associations, 310 US 534, 60 S. Ct. 1059, 84 L. ed. 1345 (1940).

[94] United States v. Jin Fuey Moy, 241 US 394, 36 S. Ct. 658, 60 L. ed. 1061 (1916).

[95] The position taken by C. & S. is supported by Pan-American Airways v. Civil Aeronautics Board, 121 F2d (CCA 2-1941) 810, and Pacific Overseas Airlines Corp. v. Civil Aeronautics Board, 161 F2d (CCA DC-1946) 633, to which the court below did not adhere. In the Pan-American case the court said:

"It seems clear that in approving or disapproving of certificates of public convenience and necessity the President must frequently act on information which was not before the Board and may even have become available to him after the Board has taken its testimony and granted the certificates. There is nothing in the Act to show that in granting certificates of public convenience and necessity the Board is acting as anything more than the President's adviser. His necessary approval or disapproval makes him, not the Board, the ultimate arbiter. United States vs. George S. Bush & Company, 310 U. S. 371, 60 S. Ct. 944, 84 L. ed. 1259.

"If the President has approved of a certificate authorizing a carrier to engage in foreign air transportation and we should attempt to review the order authorizing the issuance of the certifi-

II.

WATERMAN HAS LOST ANY RIGHT TO REVIEW BY TARDY APPLICATION.

The Rules of the Board provide:[96]

> "No petition for rehearing, reargument, or reconsideration filed in accordance with this Section, or the granting thereof, shall operate as a stay of the effective date of the final order sought to be modified or vacated by such petition, unless specifically so ordered by the Board."

The reason for the rule is plain. Certificates of public convenience and necessity are awarded to fill special needs. In a great many instances, the need is a matter of emergency.[97] It is, therefore advisable, if not imperative, that the legal delays requisite to due process be cut to a minimum to assure the public the earliest possible

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cate; we would be placed in a position where we might be obliged to reverse a tribunal whose subsequent action the President would decline to approve. His sweeping powers are illustrated by the fact that under Section 801 he is obliged not only to approve or disapprove of a certificate for foreign air transportation, but even to approve or disapprove of the denial of such a certificate by the Board. It seems incredible that in enacting Section 1006(a) Congress intended to permit a review of the action of the Board in cases where the constitutional authority of the President to negotiate with foreign nations and to proceed upon confidential and other information at his disposal and his statutory duty under Section 801 to approve or disapprove of certificates, and even of the denial of them, would necessarily render our review futile. United States v. Belmont, 301 U. S. 324, 57 S. Ct. 758, 81 L. ed. 1134; United States v. Curtiss Wright Corp., 299 U. S. 304, 57 S. Ct. 216, 81 L. ed. 255. The review of the order authorizing the issuance of the certificates is so dependent upon considerations resting in the Executive discretion that it cannot be regarded as authorized by Section 1006(a) . . ."

[96] See R. 344.

[97] Plaintiff has, in a later proceeding before the Board, alleged that an emergency exists in this particular case by reason of the critical need for a scheduled air service from Puerto Rico to the United States.

service. It is conceivable that the inauguration of service might be endlessly postponed by the dilatory tactics of an opponent to an award.[98] To avoid that sort of thing the Board enacted the above regulation.

The Board had the power to make such rules under Section 1005 of the Act.[99] Petitioner had no vested right to a rehearing. The Court has said:[100]

> "Rehearings and new trials are not essential to due process of law, either in judicial or in administrative proceedings."

In *United States v. Abilene & S. R. R. Co.*,[101] the Court had occasion to interpret Section 16(a) of the Interstate Commerce Act which is analogous to the regulations provided here by the Board. Section 16(a) provided (and the section, of course, was a congressional fiat rather than an administrative one) that an order of the Interstate Commerce Commission would not be stayed pending application for rehearing unless the Commission itself stayed the action. The Court recognized that Congress had the power to enact such provision and that in the absence of a special stay by the Commission, an application for rehearing would not suspend the running of time within which a litigant had to apply for review of an order of the Commission.

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[98] Here Waterman had already filed a motion to reopen and reconsider the case after the Examiner's report had been filed. This motion was denied on May 17, 1946. Waterman then filed and application for rehearing based on similar grounds.

[99] *Supra*, pp. 12 & 13.

[100] P. C. C. and St. L. R. Co. v. Backus, 154 US 421, 14 S. Ct. 1114, 1117, 38 L. ed. 1031 (1894).

[101] 265 US 274, 44 S. Ct. 565, 68 L. ed. 1016 (1924).

It follows from that decision that if Congress could provide that an application for rehearing would not stay the action of the Commission without a special order of that body, then Congress could delegate that same power to the Board here. For actually, if the Commission is left with the discretion as to whether or not a particular order should be stayed, then the Board is acting within its proper province when it makes a regulation to the same effect in the absence of a prohibition by Congress. Especially is this true since Congress has given the Board general powers to make rules under Section 1005 of the Act.

Since the regulations are valid, Waterman was bound by them. Moreover, the order denying Waterman's application and granting a certificate to the C. & S. was served on Waterman May 24, 1946. No special order was rendered by the Board tolling the delay following the rendition of the order and the service on Waterman. In fact, no application was made by Waterman for such an order. The petition for review was filed in the court below on September 6, 1946, clearly beyond the sixty-day statutory period. No application for leave to file after that date was made; no leave was granted.

Waterman cites *Braniff v. Civil Aeronautics Board* [102] in support of its contention that its petition for rehearing tolled the running of the sixty-day period. It is respectfully submitted that the *Braniff* decision is incorrect. It is in conflict with the holding of this Court in *Levers*

[102] 147 F2d (CCA DC-1945) 152.

v. Anderson[103] and *U. S. v. Abilene and SS Railroad Company.*[104] Moreover, the case of *Southland Industries v. Federal Communications Commission*[105] cited to support the conclusion of the court in the *Braniff* case, does not do so. The *Southland* case involved the right of an unsuccessful litigant before the Federal Communications Commission to file a petition for review while a petition for rehearing was still pending before the Commission. The court decided that the Commission had not relinquished jurisdiction in view of the specific provisions of Section 405 of the Communications Act, and its legislative history. The court was careful to point out that the result would have been different had the review been from the Court of Claims, for there special regulations governing the effect of applications for rehearing would govern. Similarly, the rules of the Board here, expressly applicable to the situation here, would control and have the same force as the special rules of any tribunal, administrative or judicial.

As a matter of fact, Waterman's petition for rehearing was denied on July 12, 1946, within time for Waterman to have filed a petition for review within sixty days from May 24, 1946, the date Waterman was served with the order under attack here.

It is submitted that Waterman had sixty days from May 24, 1946, within which to apply for a petition for review. Waterman failed to apply within the sixty-day period, failed to make any showing why the sixty-day period

[103] 326 US 219, 66 S. Ct. 72, 90 L. ed. 26 (1945).
[104] Supra, note 101.
[105] 99 F2d (CCA DC-1938) 117.

should be extended, and failed to apply for or obtain special leave of court to file its petition of review after the sixty-day period had elapsed. This petition for review, therefore, is tardy and should be dismissed.

CONCLUSION.

It is respectfully submitted that the judgment below should be reversed and Waterman's petition for review dismissed.

Respectfully submitted,

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